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NO. 87-5277

In The
Supreme Court of the United States
October Term, 1987

TONY B. AMADEO,

Petitioner,

v.

RALPH KEMP, WARDEN, GEORGIA DIAGNOSTIC AND CLASSIFICATION CENTER,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR RESPONDENT

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QUESTION PRESENTED

Whether a reasoned, deliberate, tactical decision made by competent trial counsel to forego a procedural opportunity can serve as "cause" to excuse a procedural default under the standards of *Wainwright v. Sykes*, 433 U.S. 72 (1977)?

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CITATIONS TO OPINIONS BELOW

The initial decision of the Eleventh Circuit vacating the district court's order which granted federal habeas corpus relief to Petitioner is contained in *Amadeo v. Kemp*, 773 F.2d 1141 (11th Cir. 1985). (Joint Appendix, p. 82). The final decision of the Eleventh Circuit reversing the granting of federal habeas corpus relief to Petitioner is reported in *Amadeo v. Kemp*, 816 F.2d 1502 (11th Cir. 1987). (Joint Appendix, p. 94).

JURISDICTIONAL STATEMENT

The opinion of the United States Court of Appeals for the Eleventh Circuit was entered on April 30, 1987. Petitioner's petition for rehearing was denied on June 8, 1987. The petition for writ of certiorari was docketed in this Court on August 10, 1987, and the writ of certiorari was granted on October 19, 1987, (J.A., p. 121). Petitioner has invoked the jurisdiction of this Court pursuant to 28 U.S.C. § 1254(1).

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CONSTITUTIONAL AND STATUTORY PROVISIONS

The United States Constitution, Sixth Amendment:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

The United States Constitution, Fourteenth Amendment, Section 1:

> Section 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

O.C.G.A. § 15-12-162; former Ga. Code Ann. § 59-803:

> The accused may, in writing, challenge the array for any cause going to show that it was not fairly or properly impaneled or ought not to be put upon him. The court shall determine the sufficiency of the challenge at once. If sustained, a new panel shall be ordered; if not sustained, the selection of jurors shall proceed.

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STATEMENT OF THE CASE

Petitioner, Tony B. Amadeo, was convicted in the Superior Court of Putnam County, Georgia for the offenses of murder and for criminal attempt to commit theft. Petitioner received the death penalty for the charge of murder and a ten year sentence for the charge of criminal attempt to commit theft. Petitioner's motion for a new trial was overruled by the Superior Court of Putnam County, Georgia on September 18, 1978.

On direct appeal, the Supreme Court of Georgia affirmed Petitioner's convictions and sentences in *Amadeo v. State*, 243 Ga. 627, 255 S.E.2d 718 (1979). Following the submission of briefs on Petitioner's direct appeal, Petitioner obtained new counsel, who raised additional issues for the consideration of the Supreme Court of Georgia. A motion for rehearing was filed on behalf of the Petitioner raising these additional issues including raising for the first time challenges to the arrays of the grand and traverse juries in Putnam County. The Supreme Court of

Georgia considered, but rejected, these issues raised in the motion for rehearing, stating its reasons for denying the motion in a separate opinion dated May 29, 1979.

A petition for a writ of certiorari which was filed in this Court was denied on November 26, 1979. A petition for rehearing was denied by this Court on January 21, 1980.

Next, Petitioner filed a petition for a writ of habeas corpus in the Superior Court of Putnam County, Georgia. The Superior Court of Putnam County denied Petitioner state habeas corpus relief on February 29, 1980 and did not reach the merits of the claims raising challenges to the grand and traverse juries. Next, Petitioner filed an application for a certificate of probable cause to appeal in the Supreme Court of Georgia. This application was denied on September 10, 1980, with a motion for rehearing being denied on September 24, 1980. A petition for a writ of certiorari was denied by this Court on March 30, 1981, with a petition for rehearing being denied on May 18, 1981.

Petitioner then filed an application for federal habeas corpus relief in the district court, Civil Action No. 81-122-MAC, raising all of the grounds contained in his application for state habeas corpus relief, except for raising for the first time the contention that Petitioner received ineffective assistance of counsel because of the failure of his trial attorneys to raise a challenge to the composition of the grand and traverse juries prior to Petitioner's trial. On September 22, 1982, the district court dismissed this application for federal habeas corpus relief without

prejudice, based on Petitioner's failure to exhaust his contentions concerning ineffective assistance of counsel.

On October 25, 1982, Petitioner filed a second state habeas corpus petition in the Superior Court of Butts County, Georgia, raising his contention of ineffective assistance of counsel with regard to trial counsels' failure to challenge the composition of the grand and petit juries. Respondent filed an answer and also filed a motion to dismiss the petition, asserting that the claim had been waived pursuant to O.C.G.A. § 9-14-51 and that this petition should be dismissed as successive. A hearing was conducted in the Superior Court of Butts County on March 14, 1983. Following a hearing, Respondent's motion to dismiss was granted by the Superior Court of Butts County on March 16, 1983. Petitioner filed an application for a certificate of probable cause to appeal. On June 21, 1983, the Supreme Court of Georgia denied Petitioner's application for a certificate of probable cause to appeal and Petitioner's motion for reconsideration was denied by that court on July 7, 1983.

Next, Petitioner filed a petition for a writ of certiorari in this Court on September 3, 1983 and Respondent filed a brief in opposition on October 4, 1983. On October 31, 1983, this Court denied the petition for a writ of certiorari and Petitioner's petition for rehearing was denied on January 9, 1984.

Petitioner then filed a second application for federal habeas corpus relief in the United States District Court for the Middle District of Georgia on January 25, 1984.

On April 27, 1984, Petitioner filed a motion for partial summary judgment. On May 17, 1984 the United States District Court entered an order granting federal habeas corpus relief, vacating Petitioner's convictions and sentences and directing that Petitioner be reindicted and retried. Judgment was entered in favor of the Petitioner on May 18, 1984. On June 15, 1984, Respondent filed a timely notice of appeal to the Eleventh Circuit.

The Eleventh Circuit remanded the case to the district court on September 27, 1985 for an evidentiary hearing on the issue of "cause" and "prejudice" alleged to be present for excusing Petitioner's procedural default with reference to his untimely jury challenges to the arrays of the grand and traverse juries. *Amadeo v. Kemp*, 773 F.2d 1141 (11th Cir. 1985). (J.A., p. 82). Following the conducting of an evidentiary hearing in the district court, the district court again granted federal habeas corpus relief, finding cause and prejudice to excuse Petitioner's procedural default. The Eleventh Circuit reversed the granting of federal habeas corpus relief finding Petitioner to have committed a procedural default. *Amadeo v. Kemp*, 816 F.2d 1502 (11th Cir. 1987). (J.A., p. 94). It is this order that Petitioner sought to have reviewed by this Court by means of his petition for a writ of certiorari. On October 19, 1987, this Court granted the writ. (J.A., p. 121). This brief is filed in response to Petitioner's brief filed on the merits following the granting of certiorari.

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STATEMENT OF THE FACTS

At approximately 8:30 a.m. on September 29, 1977, Talmadge Holder was driving his truck near the intersection of Hillsboro Road and Monticello Highway between Monticello and Eatonton, Georgia. While driving along this road, Holder saw his friend, Mr. James D. Turk, Sr., standing beside his truck, picking up a sack from the ground to throw it into a nearby dumpster. (T. 96).

Mr. Holder waved at Mr. Turk and pulled up to the intersection of Hillsboro Road and Monticello Highway. As Holder reached the intersection, he heard Mr. Turk yelling. When Mr. Holder rolled down the window, he could hear Mr. Turk shouting, "Help, I'm shot, somebody help me."

Mr. Holder noticed a white car sitting on the other side of Mr. Turk's truck. A short man was standing on the driver's side of Mr. Turk's truck. After hearing Mr. Turk cry out, Mr. Holder saw this person get in the nearby car and observed the car pulling off. (T. 98).

Mr. Holder identified the Petitioner as the man he saw standing by Mr. Turk's truck. Mr. Holder also noticed that there were two people inside the white car. (T. 110).

Mr. Rudy Mangham was also en route from Monticello to Eatonton on the morning of September 29, 1977. As he passed the intersection of Hillsboro Road and Monticello Road, he noticed a pickup truck parked beside the highway. (T. 114-115). The truck was parked near a dumpster and he noticed someone beside the truck, in between the truck and the dumpster. A white mid-sized

Chevrolet, with three men inside, two in the front seat, and one in the back seat, pulled out in front of him. (T. 115-116).

Eugene Resseau, Sheriff of Putnam County, was informed that there had been a shooting on Highway 16. The investigation revealed that the victim, Mr. Turk, was lying on his side next to his truck with bloodstains appearing on the side of his shirt. (T. 111-112). A .22 short bullet and expended casing were recovered from the bed of the victim's truck. (T. 119). Mr. Jim Covington of the Georgia Bureau of Investigation processed the crime scene, took photographs and recovered evidence. Agent Covington also aided in conducting interviews and received a description of the suspected vehicle in which the perpetrators of the crime were riding. A lookout was placed for a white Chevrolet Monte Carlo with an out-of-state tag, having a light background and dark numerals and letters. (T. 120).

A radio call was received from a Georgia Bureau of Investigation (GBI) agent in Thomson, Georgia, stating that this vehicle had been impounded because two white males in this car had been arrested for taking gas without paying for it. (T. 121). A .22 caliber pistol was recovered from the floorboard of the passenger side of this car. (T. 121-122). A check of the ownership of the Monte Carlo revealed that it was registered to the Petitioner, Tony B. Amadeo. (T. 113).

When the car was stopped initially, David Coulter and William Conologue were occupying the car, but the Petitioner was not taken into custody at this time. (T. 122). Later, upon discovering that the car seized in connection with this crime was registered to Mr. Amadeo,

Petitioner was taken into custody and returned to McDuffie County. (T. 226).

Petitioner, Coulter and Conologue were interviewed at the McDuffie County jail. Agent Covington took a statement from Conologue and Coulter, while Agent Haizlip and Agent Lawrence took a statement from Petitioner. The notes taken of these various interviews were compared by the GBI agents, and there were found to be major inconsistencies in the statements of Petitioner and the other two men. (T. 123). Agent Covington then talked to the Petitioner and told him there were inconsistencies in the statements. (T. 124). Agent Haizlip then returned and Petitioner made a second statement which the agent transcribed. (T. 125).

In Petitioner's second statement, he admitted that he and his two companions had been driving around Georgia looking for a small store to rob. While they were driving around, they spotted a white man in a brown pickup truck dumping trash in a dumpster. First, they passed it and then turned around and came back. Petitioner stated to Agent Haizlip that he got out of the back seat with his .22 automatic, walked up to the truck and demanded money from the man. Petitioner stated that he then shot the man and that the man grabbed his chest and slid off the right side of the truck to the ground, yelling for help. The Petitioner stated he ran for the car and they took off. Finally, the three men got on I-20 to return to North Carolina. (T. 225).

The medical examiner testifed that the cause of death to the victim, Mr. Turk, was a gunshot wound to the chest. (T. 156). Other evidence produced by the State included

evidence of another crime occuring in Alabama, admitted for the limited purpose of showing identity, motive, scheme and purpose of the Petitioner. (T. 79-80). There was testimony that the slug removed from Georgia Morris, the victim in the Alabama crime, was of a similar class and had similar characteristics to the test slug sent by the Georgia Bureau of Investigation from the weapon recovered in the Petitioner's car. (T. 179).

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SUMMARY OF THE ARGUMENT

The tactical decisions of reasonably effective counsel in this case resulted in the intentional decision to forego petitioner's right to file timely challenges to the array of the grand and traverse juries. This intentional decision of counsel to forego the right to file these jury challenges is the antithesis of the type of conduct intended to act as "cause" to excuse a petitioner's procedural default under the cause and prejudice standard.

There is no evidence to support petitioner's speculative claims that there was an "external factor" which operated as "cause" which would excuse petitioner's procedural default. Specifically, there was no "cover up" by state officials of discrimination in the composition of the master jury list, which rendered trial counsel for petitioner "unable" to file a timely challenge to the grand and traverse juries. Instead, the evidence complained of as having been concealed, which allegedly would have supported these jury challeneges, was contained in the public

records and was readily discoverable by trial counsel, had there not been a decision by counsel, based on various significant factors, that no significant advantage would have been obtained by raising any challenege.

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ARGUMENT

COMPETENT TRIAL COUNSELS' STRATEGIC DECISION NOT TO FILE A TIMELY CHALLENGE TO THE ARRAYS OF THE GRAND AND TRAVERSE JURIES RESULTED IN AN INEXCUSABLE PROCEDURAL DEFAULT.

In this case, Petitioner contends that his procedural default in foregoing his right to file timely jury challenges should be excused by what Petitioner asserts was the alleged interference by state officials with the exercise of his constitutional rights. Contrary to Petitioner's pivotal contention, which is founded only on pure speculation, inference and innuendo, there has been no "covert scheme" by state officials to purposefully discriminate in the composition of the master jury list in Putnam County, which was then "covered up" and rendered trial counsel for Petitioner "unable" to file timely jury challenges in compliance with Georgia law.

The actual issue for resolution by this Court is whether there is "cause" to excuse a procedural default which is the result of an intentional, strategic decision by experienced trial counsel based on an awareness of the relevant legal requirements.

The general rule of Georgia procedure has long required a defendant to make a jury challenge at, or before, the time the jury is "put upon him." O.C.G.A. § 15-12-162; Ga. Code Ann. § 59-803.[1] It is uncontested that Petitioner failed to challenge the composition of the grand and traverse jury lists at the time of his trial as is required under Georgia law.

The first occasion upon which Petitioner raised his challenge to the composition of the grand and traverse juries was on direct appeal to the Supreme Court of Georgia. The Supreme Court of Georgia declined to review the Petitioner's challenge to the composition of the grand and traverse juries by concluding that the challenge "came too late." *Amadeo v. State*, 243 Ga. 627, 629, 255 S.E.2d 718, 720(4) (1979), *citing*, *Goodwin v. Hopper*, 243 Ga. 193, 253 S.E.2d 156 (1979).

Similarly, in Petitioner's first state habeas corpus proceeding filed in the Superior Court of Putnam County the state habeas corpus court did not consider the jury composition issue on its merits. The state habeas corpus court found that it was precluded from reviewing this issue because the "timeliness" of the challenge had been previously determined adversely to Petitioner by the Supreme Court of Georgia.

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[1] Georgia procedure, as well as federal procedure, recognizes a "cause" exception to this timeliness requirement. *Simmons v. State*, 226 Ga. 110, 172 S.E.2d 680 (1978); *Francis v. Henderson*, 425 U.S. 536 (1976).

A. THE STRATEGIC DECISION TO FOREGO TIMELY JURY CHALLENGE.

At the evidentiary hearing conducted in the federal district court with respect to any alleged "cause" for the procedural default admitted by Petitioner, Petitioner's two trial attorneys testified as to their consideration of making a challenge to the composition of the grand and traverse juries and their strategic reasons for declining to make such a challenge at the time required by Georgia law. Petitioner's analysis of the application of procedural default principles in the context of this case totally ignores trial counsels' testimony. Instead, Petitioner relies on inference and speculation to contend that trial counsel declined to file jury challenges due to "covert interference" by the State.

Mr. William A. Prior, one of the Petitioner's trial attorneys, testified as follows with reference to his explicit consideration of filing a jury challenge on Petitioner's behalf prior to trial:

> We filed numerous other motions and we considered filing a challenge to the array. I recall that very specifically. We had a list of the jurors and we met with an attorney in Putnam County who had been there for many years, Mr. Dallas Veal. We knew—personally or had some knowledge of many of the jurors that were on the list that we had been furnished, both on the Grand and Traverse Jury. After conferring, as I recall, most of one afternoon with Mr. Veal and going over the jurors name by name and item by item we decided not to file a challenge. *The reason being that we frankly thought that if we filed it in one, we could wind up in worse shape than we were.* There were certain people on the Jury that we thought that

would be favorable to us on the panel. *So, all things considered, we did consider it and decided not to file.*

(J.A., p. 20) (emphasis supplied).

This decision not to challenge the jury arrays was based on a reasonable, adequate investigation by experienced trial counsel and the weighing of the advantages and disadvantages in filing such challenges. Mr. Prior further testified that they identified each juror on the jury list, prior to trial, as to whether they were black or white and that on the actual traverse list, the persons were approximately evenly divided as to race. (J.A., p. 21). There were either 110 or 120 jurors and the black-white ratio was approximately even, with there being numerous women included on the list. (J.A., p. 21).

Finally, and most tellingly, Mr. Prior testified with reference to the exercise of his strategic decision not to challenge the composition of the juries as follows:

> I do not recall being aware of the exact percentage of the black population of Putnam County and whether the entire Master Jury List would have met that—the requirements of that. Probably not and I probably was aware of that but I guess the point I want to make is that I did consider—*Mr. Lambert and I did consider challenging the array and it was a tactical decision on our part not to challenge the array* because of the fact that we had gone over the list with Mr. Veal; we felt like we had about as good a Jury List as we could get.

(J.A., p. 22) (emphasis supplied).

Petitioner also ignores the fact that trial counsel believed, based on his legal experience in the eight county judicial circuit including Putnam County, that, if filed, these jury challenges would more than likely be successful. On cross-examination by habeas corpus counsel for Petitioner, Mr. Prior testified that his memory was that in the eight county circuit, including Putnam County in which Petitioner was tried, there had been a challenge to the composition of the Master Jury List. However, Mr. Prior was not certain in which county this challenge had been filed, except that the challenge was not filed in Putnam County. (J.A., pp. 27-28).

With reference to Mr. Prior's knowledge of prior jury challenges to the Putnam County Master Jury List, Mr. Prior testified:

> I don't recall that I had any, although I do recall being aware that that had happened in other counties and I cannot sit here under oath and tell you that I was aware that a challenge was anticipated in Putnam County or probably would come in Putnam County or that it would've been one, if it had been instituted. I can't say that: I *can* say that I had a general knowledge of that area of the state at that time and if you had asked me to guess, I probably would have told you that it would not have met the required percentages but I can't specifically say that: I can't specifically say that I keyed on that or that that was the basis of my decision. *The basis of Mr. Lambert's decision or, at least my decision was a tactical decision based on a practical investigation as to who these particular jurors were.*

(J.A., pp. 22-23) (emphasis supplied).

Mr. Prior cited various factors which influenced his strategic decision not to timely challenge the composition of the juries:

> There were several factors: I don't think I mentioned the religious factor. There was at that time

> in Putnam County a very active charismatic religious group. I don't remember the exact name of the group; the word "shepard" was in it somewhere, I think, but at any rate, it was very active, had a relatively large following in Putnam County and several of these people had visited the defendant in jail and we knew there were several people on that particular 110 or 120-person panel who were involved in that and that was another reason for thinking we were dong about as good as we could do so we made a tactical decision, a knowing, tactical decision not to challenge the array.

(J.A., p. 23).

Counsel also knew that the prosecutor would be introducing evidence of other crimes from Alabama and Mississippi as part of the crime spree committed by these three white defendants. (J.A., p. 22). Petitioner, who is white, had assaulted black victims in these other states and left them "in pretty bad shape." *Id.* "[W]e were somewhat concerned about black members of the jury or a heavily black jury from that standpoint." *Id.* Thus, the potential lack of sympathy from black jurors because of the other black victims also served to satisfy counsel as to the racial composition of this array.

As already mentioned, another factor influencing the decision not to file a timely jury challenge was the actual make-up of the traverse jury list which Mr. Prior believed to be "favorable" to Petitioner. (J.A., pp. 20:22). With respect to the "memorandum" produced in this case which Petitioner contends was written by the District Attorney's Office to the Jury Commissioners concerning the re-composition of the Master Jury List, Mr. Prior testified:

> I assume you're referring to the memo that played a part in the case of *Bailey v. Vining*, which happened after this trial took place. I do not recall having any knowledge of that memo at that time, although at a later time and prior to the time we instituted the appeal in this case, Mr. Lambert and I represented Mr. Amadeo on the initial appeal to the Georgia Supreme Court, we did become aware of it and did put that as one of our errors in the appeal.

(J.A., p. 24).

With specific reference to why the jury issues were raised on appeal, when they were not raised at trial, Mr. Prior testified:

> At that time, frankly speaking again, we wanted everything we could get in the appeal. We had lost in Mr. Amadeo's case and we wanted to raise every issue we could raise and we did raise that issue on appeal but that probably was the first time I had any knowledge; I certainly do not remember being aware of any memo at the time of this trial.

(J.A., p. 24).

Mr. Prior testified that both he and co-counsel, Mr. E. R. Lambert, participated in writing the appellate brief and both appeared in the Supreme Court of Georgia and argued the case before that court. (J.A., p. 24).

The district court inquired of Mr. Prior, "What was known to you and/or Mr. Lambert and discussed between you all that caused you to consider challenging the jury list for this county?" Mr. Prior replied, "We considered challenging it and we thought we would win if we challenged it." (J.A., p. 28). The district court then asked Mr. Prior what led him to believe that if he challenged the list his challenge would be successful. Mr. Prior replied:

> I can't answer that; I think we just had a general knowledge that it probably wasn't statistically right and I don't know—I don't think we had any investigation to back that up. I think we just generally thought that and our thinking was, "Well, if we do, we'll gain the benefit of a delay if we win, assuming we win because they'll have to redo the Jury Box and we'll have to draw another Jury and at least we'll get a delay." On the other hand, we had already been through these jurors that we had one at a time and we knew or we thought we knew what we had there and we balanced those two factors and decided not to.

(J.A., p. 28).

Co-counsel for Petitioner at trial, Mr. E. R. Lambert, also recalled receiving advice from Mr. Dallas Veal and examining the names on the Traverse Jury List, determining what jobs people had, what race the people were and other significant factors. (J.A., pp. 30;35). As to Mr. Lambert's opinion as to whether the jury list was composed in a beneficial manner, Mr. Lambert testified:

> Well, we knew we had a tough case but we felt very comfortable with the Jury after reviewing with Mr. Veal some people we felt was, you know, would not be so wanting to give the death penalty.

(J.A., p. 35).

Mr. Lambert reiterated that he felt "very comfortable with this Jury. It was about—my recollection it was six blacks and six whites and probably more female than males". (J.A., p. 39). Mr. Lambert testified that his recollection was that the jury that actually served was six black persons and six white persons and either eight or nine women and three or four men. (J.A., p. 40).

Evidence was produced that Mr. R. W. Dennis, Sr., Clerk of the Superior Court of Putnam County, provided to Mr. Christopher Coates, an attorney seeking information on the voting procedures in Putnam County and the composition of the Master Jury List for Putnam County, a copy of a memorandum that purportedly was from the office of the district attorney and purportedly provided to the Jury Commissioners for purposes of reconstituting the jury list. (J.A., pp. 9; 41). The memorandum (J.A., p. 2) was provided to Mr. Coates in 1978. Mr. Coates testified:

> I went to the Clerk's Office and asked Mr. Dennis, who's the clerk of court in Putnam County, to provide me with as many jury lists as he could and when I say, "jury lists" I mean the Master List for both the Grand and Traverse Jury. What I was interested in doing is looking historically at whether or not blacks had been under-represented in Putnam County on the Jury List and then if I found such evidence, I would use that evidence in the *Bailey v. Vining* case as a piece of historical race discrimination evidence. *And Mr. Dennis made these documents available and I perused them.*

(J.A., p. 42) (emphasis supplied).

The memorandum in question was found by Mr. Coates in making his study of the Master or Grand and Traverse Jury List in Putnam County. (J.A., p. 44). Mr. Coates testified concerning the location of the memorandum by stating:

> I don't recall whether or not it was a book or whether it was loose-leaf pages but I do remember this memor-

andum, I found this memorandum and those materials. It was—I do—I recall that it was not on the first page of the book and it was not on the first page of the material that I was perusing but somewhere *within the stack of materials that Mr. Dennis gave me* this document appeared.

(J.A., p. 44) (emphasis supplied).

Both Mr. Prior and Mr. Lambert testified that they had no knowledge of any such "memorandum," essentially a list referencing certain target figures for the jury commissioners, or the circumstances under which it originated or the effect it was intended to have. (J.A., p. 24). Mr. Lambert testified that he did not know anything about the list until after *Bailey v. Vining* was tried in Putnam County. (J.A., p. 37). Mr. Prior testified that he raised the subject of the memorandum as an attempt to obtain review from the Supreme Court of Georgia concerning the jury issue because, "At that time, you know, the trial was over and we were searching for straws and doing everything we could to try to follow through." (J.A., p. 33).

Therefore, it can readily be seen that trial counsel for Petitioner made a strategic decision prior to trial not to challenge the array of the grand and traverse juries, even though counsel was aware that Georgia law required that to be timely, juries must be challenged at, or before, the time that a jury is put upon a defendant. Trial counsel testified that they made a strategic decision not to challenge the array of the grand and traverse juries. The decision was made by balancing the various factors involved, including the fact that at most, a successful challenge to the arrays would give them additional time prior to Petitioner's trial, but might result in them losing the favorable balance they found to exist on the jury lists which they had obtained, which lists they had perused with the help of experienced local counsel.

Trial counsels' testimony was that they were specifically aware that the arrays of the grand and traverse jury might have been susceptible to challenge, in that they were aware that another county in the circuit had its Master Jury List successfully challenged. Mr. Lambert even testified that he was specifically aware of the decisions of this Court in such cases as *Whitus v. Georgia*, 385 U.S. 545 (1967), with reference to jury composition matters and he was aware that the jury box in the Superior Court of Bibb County, Georgia, had been found to be unconstitutional by this Court. (J.A., pp. 38-39).

It was only after trial, when the alleged list submitted to the jury commissioners was discovered by other counsel in the public records kept in the Clerk's office of the Superior Court of Putnam County, that Petitioner's attorneys attempted to raise the jury issue on its merits, because at that time they "wanted everything we could get in the appeal" (J.A., p. 24), as they were "reaching for straws." (J.A., p. 33).

The attorneys knew that the jury arrays were arguably susceptible to challenge and that any challenge would probably be successful. (J.A., p. 28). Therefore, the existence of the list of target figures was irrelevant as the attorneys' decision was based on sound reasoning, including the favorable nature of the array and the fact that even a successful jury challenge, which the attorneys believed they could mount, would only bring about a delay in Petitioner's trial. *See Francois v. Wainwright*, 741 F.2d 1275, 1283 (11th Cir. 1984).

B. TACTICAL DECISIONS ARE THE ANTITHESIS OF "CAUSE."

Pursuant to this Court's decision in *Reed v. Ross*, 468 U.S. 1 (1984), it is clear that a tactical decision to forego a procedural opportunity cannot qualify as "cause" within the meaning of *Wainwright v. Sykes*, 433 U.S. 72 (1977), so as to allow a federal habeas corpus court to review procedurally defaulted claims on their merits. *Reed v. Ross*, *supra*, at 14, as cited in *Amadeo v. Kemp*, 816 F.2d 1502, 1505-1506 (11th Cir. 1987). In *Reed v. Ross*, *supra*, this Court held that:

> Underlying the concept of the cause, however, is at least the dual notion that, absent exceptional circumstances, a defendant is bound by the tactical decisions of competent counsel . . . and that defense counsel may not flout state procedures and then turn around and seek refuge in federal court from the consequences of such conduct. (cites omitted).

Reed v. Ross, supra, at 13.

This Court also stated that an attorney "may not use the prospect of federal habeas corpus relief as a hedge against the strategic risks he takes in his client's defense in state court." *Id.* This Court concluded, in language particularly applicable to this case, that:

> In general, therefore, defense counsel may not make a tactical decision to forego a procedural opportunity —for instance, an opportunity to object at trial or to raise an issue on appeal—and then when he discovers that the tactic has been unsuccessful, pursue an alternative strategy in federal courts.

Id.

Essentially, this is what occurred in the instant case, as reasonably competent and experienced trial counsel for Petitioner made a strategic determination under the totality of the circumstances to forego their chance to file a timely challenge to the arrays of the grand and traverse juries. As noted above, this decision was made based upon a reasonable investigation of the jury venire itself, with the knowledge of the applicable law concerning jury discrimination cases, with an understanding that the jury challenges would be waived by the failure to file a timely challenge and with the understanding that any jury challenge filed might have been successful only in the limited sense that Petitioner's trial would be delayed.

This Court in *Reed v. Ross*, *supra*, citing its earlier decision in *Estelle v. Williams*, 425 U.S. 501, 513 (1976), concluded that procedural default based on tactical decisions by defense counsel are "inexcusable," and cannot qualify as "cause" for purposes of federal habeas corpus review. *Reed v. Ross*, *supra*, 468 U.S. at 14. Petitioner's intentional procedural default is therefore inexcusable under the facts outlined above.

The Eleventh Circuit also concluded that Petitioner's attorneys' strategic decision not to challenge the arrays of the juries did not constitute sufficient cause to excuse Petitioner's procedural default. The Eleventh Circuit found as follows:

> The memorandum detailing the county's efforts to alter the racial composition of the Master Jury List was not concealed from Amadeo's counsel, but was readily discoverable in the county's public records. Had counsel elected to examine the jury lists, they would have found the memorandum. How-

> ever, they made a considered tactical decision not to mount a jury challenge because they wanted to preserve an advantageous jury venire. As such, they did not review the jury list and thereby did not become aware of the memorandum until its discovery during the *Bailey v. Vining* voting rights case. These facts, in our opinion, do not establish sufficient "cause" to excuse Amadeo's procedural default.

Amadeo v. Kemp, supra at 1507.

These facts cited above and found to be significant by the Eleventh Circuit are ignored by Petitioner and argued to be facts which are "clearly erroneous." Petitioner argues that the Eleventh Circuit misapplied the "clearly erroneous" rule of Federal Rule of Civil Procedure 52(a), so as to require reversal of the Eleventh Circuit's decision denying Petitioner federal habeas corpus relief. This Court has repeatedly stated, however, that its function is not to correct errors in fact finding "in the absence of a very obvious and exceptional showing of error." *Graves Manufacturing Co. v. Linde Co.*, 336 U.S. 271, 275 (1949). Petitioner's attempt to substitute his version of the facts for the Eleventh Circuit's findings is not such an "exceptional showing."

Contrary to Petitioner's assertions, there is no evidence that Petitioner's trial attorneys declined to challenge the composition of the juries due to the "governmental deception" and "covert interference" by the government with the Petitioner's exercise of his constitutional rights. It was as the result of a state official, i.e., the Clerk of the Superior Court of Putnam County, that counsel in another case became aware of the memorandum. The discovery of the memorandum was in

close proximity in time to Petitioner's trial and was readily discoverable in the public records of Putnam County as the document accompanied the Master Jury List. (J.A., pp. 42;44). There was no "cover up" or "concealment."

Petitioner has repeatedly alleged, but has never proven, that the "state deliberately concealed evidence of unconstitutional conduct." The fact that the list of target figures allegedly authored by the district attorney and allegedly submitted to the jury commissioners by him, might have supported a challenge to the juries does not negate the fact that there was a tactical decision made to forego the right to a jury challenge. Petitioner has cavalierly utilized inference, speculation and innuendo to suggest that there was a "cover up" of the memorandum and that the purpose of the memorandum was to intentionally discriminate in the composition of the Master Jury List.

An examination of the memorandum, which appears at page 2 of the Joint Appendix, establishes that the memorandum is far from clear on its face and Petitioner produced no evidence at the federal habeas corpus evidentiary hearing as to the actual author of the memorandum, the purpose of the memorandum or to whom the memorandum was submitted. Rather, the clerk of the court testified in the *Bailey v. Vining* case, not Petitioner's case, that the memo was received from the solicitor's office (J.A., p. 10) and that the clerk turned the "list" over to the chairman of the jury commission at the time the jury list was reconstituted. (J.A., p. 9). It also should be apparent that, contrary to Petitioner's assertions, the memorandum or list was not found in a mass of documents, by chance, but, instead, was a document maintained with the official Master

Jury List and produced by the Clerk of the Superior Court in response to the request of an attorney seeking to mount a challenge to the array of the Master List and its composition. (J.A., pp. 42; 44-45).

Mr. Coates, the attorney who was provided the list by the clerk, inferred that this was a memorandum in which someone had tried to tell the jury commissioners of Putnam County how to "try to remedy the challenge to their juries, add some blacks and some women, continue to underrepresent significantly those groups while at the same time arguably coming within the *Swain v. Alabama* case." (J.A., p. 46). However, this unfounded and inflammatory speculation made by Mr. Coates concerning the list provided to him by Mr. Dennis has never been supported, since no one from the district attorney's office was called to testify as to the authorship of the memorandum or purpose of its creation. Even Mr. Coates stated that it was his "theory" that the list indicated an intent to continue to underrepresent black persons and that this theory was presented to the court in the *Bailey v. Vining* case and to the same district judge who ultimately found "cause" to excuse Petitioner's procedural default in this case. (J.A., pp. 46-47).

Respondent submits that the equitable nature of habeas corpus relief to which Petitioner makes reference still does not permit "cause" to be established simply by alleging, and not proving, that the government acted improperly in allegedly directing jury commissioners to attempt to obtain specific percentages in the racial composition of the Master Jury List. At the most, Respondent submits that the list allegedly directed to the jury commissioners of Putnam County suggested target figures for the jury commissioners to utilize in attempting to obtain a more representative jury when the list was ordered reconstituted in 1977.

With specific reference to need to make timely jury challenges, this Court in *Francis v. Henderson*, 425 U.S. 536 (1976), approved the requirement of the states to insure prompt assertions of claims concerning the make-up of juries. *Id.* at 541. Citing the previous decision of this Court in *Michel v. Louisiana*, 350 U.S. 91 (1955), this Court held that:

> It is beyond question that under the Due Process Clause of the Fourteenth Amendment Louisiana may attach reasonable time limitations to the assertion of federal constitutional rights. More particularly, the State may require prompt assertion of the right to challenge discriminatory practices in the make-up of a grand jury.

Id. at 97.

Therefore, the procedural rule such as that in force in the State of Georgia with respect to challenges to jury composition is the type of rule this Court and others have seen as properly containing reasonable time limitations for asserting such rights. As this Court noted, there is a need for a prompt determination of preliminary matters such as the composition of the juries. *Id.*

In *Wainwright v. Sykes, supra*, this Court noted that the failure to require compliance with a contemporaneous objection rule detracts from the perception of the trial of the criminal case in state court as being a "decisive and portentous event." *Id.* at 90. This Court stressed in *Wainwright v. Sykes, supra*, that "if a criminal defendant

thinks that an action of the state trial court is about to deprive him of a federal constitutional right there is every reason for his following state procedure in making known his objection." *Id.*

There is ample precedent by this Court that time limitations for assertions concerning alleged defects in the make-up of the grand and traverse jury are appropriate in order to insure the integrity of the trial as the "main event" and in order to insure the prompt resolution of preliminary matters before the presentation of evidence begins.

Strong policy considerations underlie the application of the procedural default rule where, as here, there is a strategic decision by competent counsel with reference to matters preliminary to the actual trial itself. This Court so stated in *Francis v. Henderson, supra, citing, Davis v. United States,* 411 U.S. 233, 241 (1973).

Contrary to Petitioner's claims, the costs of failing to find a procedural default when there has been an intentional, strategic failure to object, in this instance to the array of the grand and traverse juries, are very high. This Court discussed the costs of federal habeas corpus review in the context of a state procedural default in *Murray v. Carrier,* — U.S. —, 106 S.Ct. 2639 (1986). This Court stated the following:

> Those costs, which include a reduction in the finality of litigation and the frustration of "both the States' sovereign power to punish offenders and their good-faith attempts to honor constitutional rights," *ibid.*, are heightened in several respects when a trial default occurs: the default deprives the trial court

> of an opportunity to correct any error without retrial, detracts from the importance of the trial itself, gives state appellate courts no chance to review trial errors, and "extracts an extra charge by undercutting the State's ability to enforce its procedural rules."

Murray v. Carrier, supra, at 2645, quoting *Engle v. Isaac,* 456 U.S. 107, 128-29 (1982).

C. NO EXTERNAL FACTOR EXISTS TO EXCUSE PETITIONER'S PROCEDURAL DEFAULT.

Petitioners appears to argue that the alleged concealment of the memorandum from Amadeo's counsel was an external factor which made compliance with the procedural default rule "impractical." Therefore, Petitioner argues that there was "cause" under the *Wainwright v. Sykes* standard. Respondent respectfully submits that regardless of the actions of state officials, including the alleged actions of the district attorney with reference to the jury commissioners, competent counsel made an informed, reasonable decision to forego a challenge to the arrays of the juries at trial. Then, after the case was on appeal, counsel determined that they should raise this issue based on the memorandum since they had lost and were "reaching for straws." (J.A., p. 33). It also appears that state officials, specifically the Clerk of the Superior Court of Putnam County, did not interfere with Mr. Coates' attempt to present this claim in another context, but in fact assisted him in obtaining information. Not only did the Clerk not "interfere" but he produced the memorandum from the Master Jury List documents at Mr. Coates' request. (J.A., p. 44). Petitioner has consistently claimed that there was intentional concealment by the

county officials and that this alleged "misconduct" should not be rewarded. Respondent respectfully submits that a review of the testimony of Petitioner's trial attorneys and the testimony of Mr. Dennis, the Clerk of the Superior Court of Putnam County, shows that there was no "intentional concealment" by the state. As the Eleventh Circuit found, these documents were "readily discoverable" in the county public records. *Amadeo v. Kemp, supra* at 1507.

Additionally, Respondent submits that simply because there was no "sandbagging" by Petitioner's attorneys in this case, i.e., there was no attempt to withhold meritorious claims for presentation at a later time, does not mean that the policies of *Wainwright v. Sykes, supra,* should not apply in this factual context. Instead, as extensively discussed above, it is clear that the cause and prejudice standard was never designed with the intent to excuse procedural defaults based on deliberate and informed, strategic decisions. *Reed v. Ross,* 468 U.S. 1, 13-14 (1984). Clearly the principles of comity and finality require there to be no finding of "cause" where there has been the exercise of intentional, strategic bypass of orderly state procedures. See *Engle v. Isaac,* 456 U.S. 107, 135 (1982).

The factual premises for Petitioner's position are unfounded. Specifically, Petitioner ignores the testimony of his trial attorneys when he contends that he was "unable" to challenge the composition of the grand and traverse juries due to the alleged concealment of the memorandum, which was a public document, from his attorneys. Respondent respectfully submits that this was not a question of "inability" to raise a claim. This, rather, was a

considered decision to forego such a claim at the appropriate time and a subsequent decision to raise the claim at a later point only after the strategy to avoid the imposition of the death sentence had failed. Therefore, this is not a case which involves the "inability" to raise a claim, but rather involves the weighing of the efficacy of filing such a claim in light of the totality of the circumstances known to Petitioner's counsel prior to his trial. Therefore, based on the evidence cited above, the failure to file the claim was not, as a causal matter, due to any factual basis for the claim being "concealed" by the state. Respondent specifically does not concede that there was any discriminatory scheme or concealment by the State which operated so as to interfere with Petitioner's ability to present the claim. Petitioner had a factual and legal basis for making such a claim, but simply chose not to do so. *Compare Murray v. Carrier, supra* at 2646.

In short, there was no cause and effect between the failure to know of the existence of the memorandum prior to Petitioner's trial and the attorneys' strategic decision not to file a challenge, even though it was believed that such a challenge would be successful but would simply result in a delay of the proceedings against the Petitioner.

With specific reference to Petitioner's failure to challenge the grand jury, as opposed to the traverse jury (the array of which Petitioner's attorneys believed to be favorable to Petitioner), Respondent notes that in *Reece v. Georgia,* 350 U.S. 85 (1955), this Court accepted the validity of the Georgia rule requiring that challenges to the grand jury be made prior to indictment.

In two recent Eleventh Circuit cases, that Court has correctly determined that no showing of prejudice could be

made to excuse the failure to file a timely grand jury challenge because "a successful grand jury challenge would have served only to delay the date of trial." *Francois v. Wainwright*, 741 F.2d 1275 (11th Cir. 1984), and *Godfrey v. Kemp*, No. 85-8570 (11th Cir. Jan. 20, 1988). In *Godfrey v. Kemp*, the Eleventh Circuit found that "in this case there is little doubt that had Godfrey's original indictment been quashed he would have been reindicted." *Godfrey v. Kemp, supra*, slip op. at p. 23. In holding that the two petitioners in those cases had not met the prejudice prong of the cause and prejudice requirement, the Eleventh Circuit noted that it was aware of this Court's recent decision in *Vasquez v. Hillery*, 474 U.S. 254, (1986). The Eleventh Circuit held as follows:

> There [in *Vasquez v. Hillery, supra*] the Supreme Court held that once a prisoner demonstrates that he was indicted by an unconstitutionally composed grand jury he is entitled to have his conviction reversed automatically. The Court acknowledged that this decision was merely an affirmation of its decision six years earlier in *Rose v. Mitchell*, 443 U.S. 545 (1979) . . . In *Francois* we rejected the argument that Mitchell's automatic reversal rule set aside the prejudice requirement of *Francis*. We reasoned that because *Mitchell* expressly distinguished itself from *Francis* on the ground that the petitioners in *Mitchell* did not procedurally default on their grand jury claims, the decision in *Mitchell* did not call into question *Francis's* requirement of a showing of actual prejudice. Because the petitioners in *Vasquez* also did not procedurally default on their claim, we see nothing in that opinion that suggests it has altered our reasoning in *Francois*.

Godfrey v. Kemp, supra, slip op. at p. 23-24, n. 12.

Similarly, in this case, there is no "cause" for excusing the procedural default committed by Petitioner with reference to the grand jury claims. Respondent further submits there is no showing of prejudice with respect to the grand jury, nor can Petitioner establish cause simply based on a contention that a grand jury challenge in this case might have been successful, succeeding only in delaying the date of Petitioner's trial. Compare *Smith v. Murray*, — U.S. —, 106 S.Ct. 2661, 2666-2667 (1986).

Based on the above and foregoing, it is clear that there was no "external factor" or "interference by state officials" which impeded competent trial counsel's ability to file timely grand and traverse jury challenges, as postulated by this Court as a possible scenario which would demonstrate "cause" so as to excuse a state procedural default. Rather, Respondent respectfully submits that the facts of this case place it squarely within the purview of *Wainwright v. Sykes, supra*, and its progeny. These cases stand for the proposition that reasonable, intentional, strategic decision. made by competent trial counsel are the antithesis of the type of circumstance which can constitute "cause" to excuse a state prisoner's procedural default, especially where the state procedure is, as here, a procedure of long-standing and which has been constitutionally approved.

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CONCLUSION

For all of the above and foregoing reasons, Respondent respectfully submits that this Court should affirm the convictions and sentences imposed by the state of Georgia with reference to Petitioner and that this Court should affirm the decision of the Eleventh Circuit Court of Appeals declining to review Petitioner's jury challenges on their merits due to the absence of cause for excusing Petitioner's state procedural default.

Respectfully submitted,

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